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ROSEBURG RESOURCES CO.

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10 BEFORE THE STATE OF CALIFORNIA

11 BOARD OF FORESTRY AND FIRE PROTECTION

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14 IN THE MATTER OF THE APPEAL OF
15 ROSEBURG RESOURCES CO. FOR THE
16 RETURN OF TIMBER HARVESTING PLAN
17 NO. 2-06-106 SHA (4) BY THE DIRECTOR OF
18 THE DEPARTMENT OF FORESTRY AND
19 FIRE PROTECTION

THP No. 2-06-106 SHA (4)

**REPLY OF ROSEBURG
RESOURCES CO.**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THIS BOARD’S REVIEW IS EXPRESSLY GOVERNED BY THE FOREST PRACTICE ACT AND FOREST PRACTICE RULES	1
III. THE ONLY EVIDENCE FOR THE BOARD TO REVIEW IS ROSEBURG’S— NOBODY ELSE, INCLUDING CAL FIRE OR STATE PARKS, SUBMITTED EVIDENCE	2
IV. IN ORDER TO HARVEST ITS OWN TIMBERLANDS, ROSEBURG PATIENTLY ADDRESSED EVERY SPECULATIVE CONCERN RAISED OVER THE COURSE OF A YEAR	3
V. CONCLUSION	5

1 **I. INTRODUCTION**

2 Given the need to work with the California Department of Forestry (“CAL FIRE”) on the
3 review and approval of timber operations, Roseburg’s decision to appeal this determination by
4 CAL FIRE was not made lightly. In this instance, however, Roseburg was confronted with an
5 unreasonably delayed decision that, in the end, arbitrarily denied Roseburg’s THP—a THP that
6 was carefully designed, and that was supported by detailed evidence and analysis. When
7 Roseburg received the denial, Roseburg sat down and reviewed the administrative history of the
8 THP, reviewed the findings by CAL FIRE, and reviewed all of the available evidence. In the end,
9 Roseburg could only conclude that the denial was unjustified. With a year’s worth of resources
10 expended on the THP, including the development of a detailed photographic study and a
11 landscape model to allay any concerns that had been raised over visual impacts, Roseburg could
12 not just walk away from CAL FIRE’s arbitrary and incorrect result. Instead, Roseburg elected to
13 seek review by the Board of Forestry—a review afforded by the Legislature in the California
14 Forest Practice Act (“FPA”) and implemented through the Forest Practice Rules (“FPRs”)
15 adopted by this Board.

16 **II. THIS BOARD’S REVIEW IS EXPRESSLY GOVERNED BY THE FOREST**
17 **PRACTICE ACT AND FOREST PRACTICE RULES**

18 The FPA states that the Board of Forestry shall “review *the plan* to determine if the plan is
19 in conformance with the rules and regulations of the board and with this chapter.” Cal. Pub. Res.
20 Code § 4582.7(c) (emphasis added). The review is of the plan, not of CAL FIRE’s decision, and
21 the substantial evidence test that CAL FIRE advocates (devoting many pages of its submission to
22 this one argument) is not applicable. This Board’s rules are consistent with the FPA in calling for
23 the Board to “determine whether, upon the record before it, *the plan* is in conformance with the
24 rules and regulations of the Board and the provisions of this Act.” Cal. Code Regs., tit. 14, §
25 1054.8 (emphasis added). Again, the Board reviews the record and the plan, not CAL FIRE’s
26 decision, and determines for itself whether it should approve or deny the plan. The statutory and
27 regulatory language both call for independent *de novo* review—CAL FIRE seems to concede this
28 at page 8 of its submission where it states that “the Board reviews the administrative record ‘de

1 novo' and is not bound by the decision made by CAL FIRE." However, in the next breath, CAL
2 FIRE asserts that the Board is "limited to determining whether CAL FIRE based its decision to
3 disapprove the Blacktail THP on substantial evidence in the record." Response Br. at p. 8. The
4 error CAL FIRE makes is relying on statutory provisions governing *court* review of agency
5 decisions.

6 The two statutory provisions of the California Environmental Quality Act ("CEQA")
7 relied on by CAL FIRE both expressly state that they apply to "court review" of agency
8 decisions—they do not apply here. Unsurprisingly, every case law decision that CAL FIRE relies
9 on also involved *court review* of agency decisions, not agency appellate review—CAL FIRE's
10 attempt to extend this standard to the Board's review is not justified. The California Supreme
11 Court has directly addressed the Board's role, stating "the board retains the ultimate power of
12 approval over a plan." *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1220 (1994). The
13 Court further explained that the Director shows deference to the Board, not the other way around.
14 "[T]he director of the department is not to approve or disapprove timber harvesting plans based
15 on his or her own conception of what is good forest policy, but rather, based on the board's
16 conclusions." *Id.* at 1232. The law calls for the Board to "review the plan to determine if the
17 plan is in conformance with the rules and regulations of the board and with this chapter," not
18 engage in a substantial evidence review. Cal. Pub. Res. Code § 4582.7(c).

19 **III. THE ONLY EVIDENCE FOR THE BOARD TO REVIEW IS**
20 **ROSEBURG'S—NOBODY ELSE, INCLUDING CAL FIRE OR STATE**
21 **PARKS, SUBMITTED EVIDENCE**

22 While the standard of review may be an interesting subject, in the end it is of no relevance
23 to this particular proceeding because there is no competing evidence. "[W]here the evidence is
24 undisputed, the issue becomes one of law"—and issues of law are reviewed de novo (by both
25 agencies and courts). 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency, § 93, pp. 140-
26 141; *see also Jordan v. City of Sacramento*, 148 Cal. App. 4th 1487, 1497 (2007). Both
27 Roseburg and CAL FIRE are relying on the same evidence—Roseburg's. In its response, CAL
28 FIRE relies solely on Roseburg's analysis to assert that substantial evidence exists to support its
denial of the THP. *See, e.g.,* Response Br. at 1 (referring to "Roseburg's own visual analysis"), 5

1 (referring to Roseburg's amendment of the visual resources cumulative impacts assessment).
2 Notably, when CAL FIRE makes assertions that "evidence in the record shows that" views will
3 be degraded, there is no citation to the record. Response Br. at 13. Absent from the submission
4 by CAL FIRE is citation to any of its own, or any third party evidence—instead CAL FIRE relies
5 entirely on Roseburg's analysis to argue significant visual impacts will occur.

6 The only two other sources that CAL FIRE refers to are (1) "several complaints over the
7 years" (again with no citation) and (2) a comment e-mail from State Parks that only states what
8 changes it would like (AR 431). With respect to alleged past complaints, not only are they
9 necessarily with respect to other locations, but there were no letters to substantiate them. (AR
10 331.) The CEQA Guidelines are unequivocal that "argument, speculation, unsubstantiated
11 opinion or narrative . . . does not constitute substantial evidence." Cal. Code Regs. tit. 14,
12 § 15384. As for State Parks, no evidence was ever submitted to substantiate their concerns.
13 Nevertheless, after learning State Parks had some concerns, Roseburg prepared a detailed
14 photographic analysis and modeling specifically to demonstrate that the concerns were not
15 substantiated. (AR 311.) Neither CAL FIRE nor State Parks submitted any independent
16 evidence to the contrary. Thus, the body of evidence consists solely of that compiled by
17 Roseburg, and nothing more.

18 **IV. IN ORDER TO HARVEST ITS OWN TIMBERLANDS, ROSEBURG**
19 **PATIENTLY ADDRESSED EVERY SPECULATIVE CONCERN RAISED**
20 **OVER THE COURSE OF A YEAR**

21 In the rest of its submission, CAL FIRE overstates Roseburg's argument with respect to
22 TPZ zoning and MSP requirements—Roseburg is not arguing that the zoning and production
23 provisions "eliminate" aesthetic impact review. The point, however, is that TPZ zoning is
24 designed so that everyone (especially a neighbor) is on notice, and knows, that timber harvesting
25 "may reasonably be expected to and will occur on that parcel." Cal. Gov't Code § 51115.1(a);
26 *see also id.* § 51115.1(b) (Legislature's intent "to make clear . . . that timber operations are
27 expected to occur on that parcel at a future date."). Roseburg submits that this provision is
28 relevant to determining what level of visibility of timber operations should be allowed,
particularly where there are no identifiable special treatment areas involved. In contrast,

1 CAL FIRE's position in this instance appears to be that the operations must be completely
2 invisible, notwithstanding that the Legislature has made clear to everyone that harvesting is
3 expected to take place. The law reveals that CAL FIRE's position is wrong—as the court in
4 *Bowman v City of Berkeley (Affordable Housing Associates)*, 122 Cal. App. 4th 572, 589 (2004),
5 stated: “[t]hat some, or perhaps all, environmental impacts have an esthetic facet, does not mean
6 that all adverse esthetic impacts affect the environment. That is neither good logic nor good
7 law.”¹

8 Beyond the legal errors, CAL FIRE's submission also contains a multitude of errors
9 regarding the administrative history. For example, CAL FIRE accuses Roseburg of somehow
10 trying to minimize visual concerns by “failing to even identify” the State Park or Interstate 5 in
11 the THP description (Response Br. at 12), overlooking that the General Description does identify
12 the park. (AR 86.) Indeed, even CAL FIRE acknowledges that “the maps attached to the THP
13 clearly demonstrate the proximity of the THP to interstate 5 and Castle Crags State Park”
14 (Response Br. at 2). In another example, CAL FIRE insinuates that Roseburg should have
15 separately consulted with State Parks (Response Br. at 2-3), overlooking that Roseburg sent two
16 scoping letters to State Parks before the THP was even submitted (AR 214-16, 222-23), and that
17 State Parks received a full copy of the THP only 10 days after it was submitted. (AR 361.)
18 Moreover, State Parks was invited to participate in first review and attend preharvest inspection,
19 but it did not. In yet another example, CAL FIRE suggests that Roseburg's amendment of its
20 THP “did not include additional evidence” to support its position (Response Br. at 5),
21 overlooking that Roseburg submitted a 68 page visual assessment (consisting of photographs and
22 modeling) on March 20, 2007. (AR 335.) With respect to incorporation of feasible mitigation
23 measures, CAL FIRE acknowledges up front that “Roseburg agreed to mitigate impacts from six
24 of the seven units” that CAL FIRE had identified. Response Br. at 2. This fact hardly reflects the
25 picture of obstinacy that CAL FIRE tries to draw of Roseburg.

26
27 ¹ Roseburg discussed this decision in its prior submission, but CAL FIRE did not address
28 it in its response.

1 Roseburg met CAL FIRE's requests on all but one unit.² On that unit, Roseburg
2 recognized that the demands made with respect to Unit 102, with no evidentiary support, did not
3 constitute an appropriate mitigation measure. Nevertheless, Roseburg incorporated substantial
4 mitigations (dramatically understated by CAL FIRE in its submission). The THP first explains
5 that all units were planned with visual mitigation in mind, incorporating 12 approaches for forest
6 landscape management to minimize any visual impacts. (AR 142-43.) Then, with respect
7 specifically to Unit 102, the THP provided much more than "2 individual leave trees per visible
8 acre throughout the unit and retention of three black oak trees to screen 19 acres of proposed clear
9 cut" that CAL FIRE suggests. (Response Br. at 3.) In fact, no more than 17 acres are ever visible
10 at one time (AR 133), and the specific mitigation for the unit includes: (1) two individual leave
11 trees per visible acre; (2) three large black oaks retained along the southeastern ridge; (3) two
12 habitat retention areas—one on the western ridge to screen a portion of the ridgeline and one
13 adjacent to a spring in the center of the unit along the north boundary; (4) portions of the
14 boundary configured with irregular edges to blend into the surrounding landscape; and (5) the
15 retention of understory cover for two Class III watercourses in the northern 1/3 of the unit. (AR
16 144.) And as set forth in Roseburg's original submission, most views are intermittent and
17 screened. The record is filled with measures to address any perceived concerns, and with
18 evidence to substantiate the lack of impacts. What is absent from the record is any separate
19 evidence from CAL FIRE to substantiate its position, and any engaged participation by State
20 Parks. The negative portrayal of Roseburg and the THP is inaccurate and contrary to the
21 record—Roseburg waited patiently for a year for this THP, and provided detailed evidentiary
22 support to meet any perceived concerns. The THP should have been approved.

23 V. CONCLUSION

24 The timber industry already faces tremendous challenges from formidable opponents that
25 would welcome the industry's extinction. CAL FIRE's attempt in this instance to try and hide

26 ² CAL FIRE's statement that the unit is the closest to the park is also wrong. Response
27 Br. at 2; AR 59. Obvious errors such as this reflect the lack of consideration that CAL FIRE has
28 afforded this THP throughout.

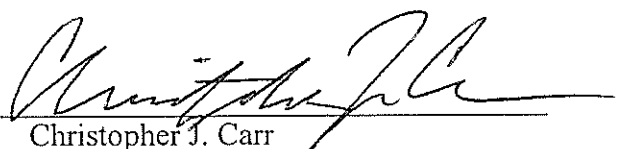
1 timber operations from all eyes only plays into their hands and hastens the industry's demise.
2 CAL FIRE's vociferous objection to Roseburg's video—a video that was intended as a surrogate
3 for a site visit so the Board could see the area for itself—is frustratingly consistent.³

4 Roseburg knows it will be working again with CAL FIRE. Nevertheless, Roseburg felt
5 compelled to call out the Redding Office on this erroneous denial of a carefully planned and
6 thoroughly documented THP. Mere visibility, with partial screening, of a portion of only one
7 unit, for less than ten years, does not warrant denial of the THP. Roseburg respectfully submits
8 that the Board must make a decision whether to approve or deny the plan based on its own review
9 of the record, and respectfully requests it approve the THP.

10 Dated: December 21, 2007

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12 By:


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14 ROSEBURG RESOURCES CO.
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25 ³ CAL FIRE and Roseburg have had the benefit of viewing the environs on site, the Board
26 likely has not. Given that the Board's hearing procedures provide for an open hearing that
27 includes statements by the plan submitter and by the public (Cal. Code Regs. tit. 14, § 1054.7),
28 and given this proceeding is about visual resources, CAL FIRE's adamant demand for exclusion
of a video showing the location is both specious and telling.